Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SANDRA L. CRAFT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal tax lien that arises by operation of law in "all property and rights to property" of a delinquent taxpayer (26 U.S.C. 6321) attaches to the rights of that taxpayer in property held in a tenancy by the entirety.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-41a, 44a-69a) are reported at 140 F.3d 638 and 233 F.3d 358. The opinions of the district court (App., *infra*, 70a-93a, 95a-104a) are reported at 74 A.F.T.R.2d (RIA) 6362, 76 A.F.T.R.2d (RIA) 7447, and 65 F. Supp. 2d 651.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2000. App., *infra*, 42a. The petition for rehearing was denied on March 16, 2001. App., *infra*,

43a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 6321 of the Internal Revenue Code, 26 U.S.C. 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

STATEMENT

1. a. Don Craft failed to file federal income tax returns for the years 1979 through 1986. In 1988, the Internal Revenue Service assessed $482,446 in unpaid income tax liabilities owed by him and demanded payment. App., *infra*, 45a. When Mr. Craft failed to pay these taxes, the federal tax lien attached by operation of law to "all property and rights to property" in which he owned any interest. 26 U.S.C. 6321. Notice of the federal tax lien was filed on March 30, 1989, in the county of his residence. App., *infra*, 45a.

b. Sandra L. Craft is the wife of Don Craft and the respondent in this case. In 1972, Don and Sandra Craft purchased real property in Grand Rapids, Michigan, as tenants by the entirety. App., *infra*, 45a. On August 28, 1989, after the notice of tax lien had been filed for the taxes owed by Don Craft, the Crafts jointly executed a quitclaim deed that purported to transfer this property solely to Sandra Craft for one dollar. *Id.* at 70a. When she thereafter attempted to sell the

property in 1992, a title search revealed the government's lien. The Internal Revenue Service agreed to release the tax lien from this property so that the sale could be made, with the stipulation that half of the net proceeds—amounting to $59,944.10—were to be held in escrow pending a final determination of the rights of the parties. *Id.* at 45a-46a.

2. Sandra Craft then brought this action to quiet title to the escrowed proceeds. The government asserted in its answer (i) that the federal tax lien attached to Don Craft's interest in the property when it was held by the Crafts as tenants by the entirety, (ii) that when the property was conveyed to respondent it remained subject to the government's lien and (iii) that the government is therefore entitled to one-half of the sale proceeds. The government further asserted that Don and Sandra Craft's purported conveyance of the property to Sandra Craft was invalid as a fraud on creditors.

The district court granted the government's motion for summary judgment. The court held (i) that the conveyance of the property to respondent terminated the tenancy by the entirety, (ii) that, at that moment, each spouse took an equal one-half interest in the estate and (iii) that the government's lien attached to Don Craft's one-half interest in the estate at that time and remained attached to the property throughout any subsequent transfers. App., *infra*, 104a. The court concluded, however, that the tax lien attached only to the value of Don Craft's interest as of the date of the Crafts' conveyance of the property to respondent and not to any appreciation of that property's value that occurred subsequent to that date. *Id.* at 46a-48a, 104a.

3. a. Both parties appealed. App., *infra*, 44a. On respondent's appeal, the court of appeals reversed the determination of the district court that the tax lien

attached to the property.[1] Relying on that circuit's earlier decision in *Cole* v. *Cardoza*, 441 F.2d 1337 (6th Cir. 1971), the panel majority held that Don Craft never had an attachable interest in the property held in a tenancy by the entirety—either prior to, or at the transitory moment of, the conveyance to respondent. App., *infra*, 54a-56a. In reaching that conclusion, the majority relied on the common-law fiction, adopted in Michigan, that property held in a tenancy by the entirety is not owned by either of the spouses but is instead owned by the "marital unit." The court concluded that the husband (who owed the taxes) had no separate interest in entirety property to which the tax lien could attach. *Ibid.* Since Michigan law exempts property held in a tenancy by the entirety from seizure by creditors for the debts of only one spouse, the majority concluded that this property was exempt from the federal tax lien for the separate tax debt of one spouse. *Id.* at 57a-58a.

According to the panel majority, the decisions of this Court in *United States* v. *Irvine*, 511 U.S. 224 (1994), and *United States* v. *Rodgers*, 461 U.S. 677 (1983), have no effect "on the government's ability to attach a lien to an entireties estate, because these cases do not alter the basic tenet that state law governs the issue of whether any property interests exist in the first place." App., *infra*, 55a. The court remanded the case for consideration of the fraudulent conveyance issue which had not been addressed by the district court. *Id.* at 58a.

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[1] As a result of that ruling, the court of appeals did not consider the government's appeal of the district court's determination that the tax liens did not attach to any appreciation occurring after the Crafts' conveyance of the property to respondent.

b. Judge Ryan concurred in the remand but dissented from the majority's conclusion that a spouse's interest in entirety property is not "property or rights to property" to which the federal tax lien may attach. App., *infra*, 69a. He concluded that each spouse has valuable, legally-protected rights in property held in a tenancy by the entirety to which the tax lien attaches as a matter of federal law: in particular, each spouse has the right to share in the proceeds of any sale or lease of the property and the right to the entire property if the other spouse predeceases him. *Id.* at 61a. Judge Ryan added that this Court's decisions in *United States* v. *National Bank of Commerce*, 472 U.S. 713 (1985), and *United States* v. *Irvine*, *supra*, make it clear that the state legal fiction that the husband and wife are a single entity—and the associated fiction that neither has any separate interest in entirety property—cannot be interposed to preclude the operation of the federal lien (App., *infra*, 63a-64a):

> As the Supreme Court has made clear, such state-law fictions, while they are perhaps valid defenses against state-law creditors, have no effect on an IRS lien. For example, in *National Bank of Commerce*, the fact that no Arkansas creditor could reach funds of a taxpayer-debtor that were held in a joint account with other nondebtor individuals did not prevent the IRS from attaching the entire account.
> * * *
>
> Although the majority disagrees, I am satisfied that *United States* v. *Irvine*, 511 U.S. 224 (1994), also undermines Sandra Craft's position. In *Irvine*, the Court reiterated that legal fictions—although valid protection from creditors under state law—could not be used to avoid federal tax liabilities.

Judge Ryan noted, moreover, that the majority opinion "not only contravenes established precedent," it also "provides an avenue for easy avoidance of federal income-tax laws." *Id.* at 69a.[2]

4. On remand, the district court concluded that when, as here, property is made exempt from the claims of creditors under state law, a conveyance of that property cannot be a fraudulent transfer under state law. App., *infra*, 79a-85a. The court stated, however, that this "no-harm-no-foul rule" is inapplicable when the debtor, while insolvent, places non-exempt funds beyond the reach of his creditors by using them to enhance exempt property. *Id.* at 85a-86a. Since Don Craft had enhanced the value of the property by making mortgage payments while he was insolvent, the court held that the government is entitled to a lien on his share of the sale proceeds to the extent of the enhanced value—which the court concluded was $6693. *Id.* at 86a, 92a.[3]

5. Both parties again appealed. App., *infra*, 1a-2a. The government also petitioned the court of appeals for

[2] Judge Ryan was of the view that the federal tax lien would not follow the property after its transfer to respondent unless that transfer was set aside as fraudulent. See App., *infra*, 69a-70a. He concurred in the remand solely for the purpose of determining whether Don and Sandra Craft's transfer of the property for $1 to Sandra Craft as sole owner constituted a fraud on creditors. *Id.* at 70a.

[3] This figure included only the portion of the mortgage payments that had been applied to reduce the principal balance of the loan. The district court rejected the government's additional claim to recover the far greater interest payments, as well as local ad valorem property tax payments, that Don Craft made over the years with the untaxed income that generated the tax liability in the first place. App., *infra*, 92a-93a.

hearing en banc on the ground that the decision in *Craft I* conflicted with the relevant decisions of this Court. The court of appeals denied that petition in December 1999. App., *infra*, 6a.

a. The panel to which the appeal was assigned concluded that it was bound by the prior decision in *Craft I* and dismissed the government's appeal.[4] App., *infra*, 2a. The panel stated that it was bound by *Craft I* because the relevant Supreme Court decisions do not "directly h[o]ld otherwise" (*id.* at 11a) and because the recent decision of this Court in *Drye* v. *United States*, 528 U.S. 49 (1999), which was issued after *Craft I* was decided, "has not so fundamentally changed the legal landscape as to overrule *Craft I*." App., *infra*, 18a.

b. In a concurring opinion, Judge Gilman agreed that the panel was bound by *Craft I* but concluded "that the result reached in *Craft I*, and that this court endorses today, is inconsistent with Supreme Court precedent and should be reversed." App., *infra*, 35a. Judge Gilman therefore recommended "that this case be revisited en banc." *Ibid.*

Judge Gilman stated that the decision in *Craft I* was inconsistent with the decisions of this Court that make clear that the federal tax laws are "not struck blind" by state-law legal fictions. App., *infra*, 36a (quoting *United States* v. *Irvine*, 511 U.S. at 240). Judge Gilman stated that (App., *infra*, 38a):

> [i]n contravention of *Irvine*, the majority in *Craft I* failed to look past Michigan's characterization of an individual's interest in entireties property and

[4] On respondent's appeal, the panel affirmed the district court's ruling that the government is entitled to a lien on the property to the extent of taxpayer's payments of the principal of the outstanding mortgage loan. App., *infra*, 20a-23a.

> ignored the substantial rights actually held by Don Craft, which similarly had undeniable value. In other words, I believe that the majority in *Craft I* was "struck blind" by Michigan's "legal fictions."

Judge Gilman noted that each spouse has several valuable, legally-protected rights in entirety property to which the federal tax lien may attach: (i) the right to enter and enjoy the property and to exclude all others; (ii) the right to half of any rental or sale proceeds; (iii) a contingent right of survivorship; and (iv) in the event of divorce, the right to bring an action for partition and sale. App., *infra*, 37a-38a. Because these valuable rights are protected under state law, "*Craft I* reached the wrong result, and the IRS ought to have had the right to attach Don Craft's valuable interest in the tenancy by the entirety." *Id.* at 38a. Although Judge Gilman believed the panel was bound by *Craft I*, he recommended that the case be reheard *en banc* because "*Craft I* contravenes recent Supreme Court decisions." *Id.* at 41a.

c. Following the entry of the panel decision, the government filed a petition for rehearing *en banc*. That petition was denied when "less than a majority of the judges" of that circuit voted to grant it. App., *infra*, 43a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals departs from numerous recent decisions of this Court, including *Drye* v. *United States*, 528 U.S. 49 (1999), *United States* v. *Irvine*, 511 U.S. 224 (1994), *United States* v. *National Bank of Commerce*, 472 U.S. 713 (1985), and *United States* v. *Rodgers*, 461 U.S. 677 (1983). It is also irreconcilable with older precedent of this Court, such as *Tyler* v. *United States*, 281 U.S. 497 (1930).

The question presented in this case has substantial, recurring importance. Tenancies by the entirety are recognized in 24 States, which have adopted widely varying rules regarding the rights of creditors in such property. See note 14, *infra*. Under the decision in this case, taxpayers in States that maintain the common law fiction that property held in a tenancy by the entirety is held by the "marital unit"—rather than by the individual spouses acting collectively—receive an exemption from enforcement of the federal tax lien that is not available in jurisdictions with a more modern jurisprudence. See note 15, *infra*. Similarly, a taxpayer who owns entirety property in States where creditors cannot attach such property for the debts of only one spouse is treated more favorably than a taxpayer who owns property in the States where creditors are permitted by state law to attach such property. See note 16, *infra*. The conflicting treatment that results under the erroneous decision of the court of appeals warrants review by this Court, for it is well established that the Nation's tax laws are to be interpreted and applied to "ensure as far as possible that similarly situated taxpayers pay the same tax." *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 544 (1979). See pages 20-24, *infra*.

Further review is especially warranted because the decision in this case "not only contravenes established precedent, but provides an avenue for easy avoidance of federal income-tax laws." App., *infra*, 70a (Ryan, J.). Significant opportunities for extraordinarily facile evasion of tax obligations exist under the decision in this case. Under the laws of many States, both real and personal property may be held in a tenancy by the entirety. See notes 17-18, *infra*. Under the decision in this case, not only residences but also bank accounts

and other financial assets may be purchased with untaxed income and then shielded from tax collection through the simple artifice of placing ownership in the "marital unit" through a tenancy by the entirety. It is difficult to conceive of a more simple or widely available method of tax evasion.[5]

The amount of revenue potentially affected by the rule adopted by the court of appeals is obviously enormous, for it provides a ready device for avoiding collection of the taxes owed by all married persons in the many states (such as Michigan) that maintain the common-law fiction that ownership of tenancy-by-the-entirety property resides solely with the "marital unit." Under the reasoning of the court of appeals, both spouses could earn income, file separate returns,[6] and

[5] This is illustrated by another pending Michigan case that involves a lawyer who filed tax returns for several years that reported extensive income from his law practice. Instead of paying these taxes, the lawyer used his untaxed income to accumulate equity in four valuable parcels of property that he placed in a tenancy by the entirety. The district court concluded that, under the decision in *Craft I*, the federal tax liens did not attach to these properties. The government has appealed that decision (*Hatchett* v. *IRS*, 126 F. Supp. 2d 1038 (E.D. Mich. 2000), appeal docketed, No. 00-1645 (6th Cir. June 13, 2000)), but the taxpayer's transparent scheme to avoid collection appears likely to succeed in the absence of review by this Court of the decision in this case.

[6] Married taxpayers become jointly and severally liable for taxes when they elect to file joint returns. See 26 U.S.C. 6013(d)(3). Since, if they file a joint return, both spouses are liable for the resulting taxes, property held in a tenancy by the entirety could then be seized for collection in states (such as Michigan) that allow such property to be seized to collect a debt owed by both spouses. See App., *infra*, 52a. The tax avoidance scheme sanctioned by the court of appeals in this case thus operates only when married taxpayers file no returns or file separate, rather than joint, returns. See note 7, *infra*.

avoid paying taxes by shielding their residence, bank accounts and other financial assets in a tenancy by the entirety.[7] Review by this Court of this recurring question is needed to prevent the "easy avoidance of federal income-tax laws" that is sanctioned by the decision below. App., *infra*, 70a (Ryan, J.).

1. When a taxpayer fails to pay taxes after a demand for payment has been made, a lien arises by operation of law "in favor of the United States upon all property and rights to property" of that taxpayer. 26 U.S.C. 6321. The question in this case is whether the interest of a married taxpayer in property held in a tenancy by the entirety is encompassed within the sweeping scope of this statutory lien. As this Court has emphasized on several occasions, "[t]he statutory language 'all property and rights to property' * * * is broad and reveals on its face that *Congress meant to reach every interest in property that a taxpayer might have.*" *United States* v. *National Bank of Commerce*, 472 U.S. at 719-720 (emphasis added). Indeed, "[s]tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945). Recognizing the sweeping text and purpose of the statute, this Court has recently held that this broad federal tax lien "reach[es] every species of right or interest protected

[7] The decision in this case provides obvious incentives for tax protestors (and others) to employ the tenancy-by-the-entirety device to obstruct collection of tax obligations. Indeed, taxpayers have not been shy about employing this tax avoidance method. The Internal Revenue Service informs us that, among Michigan taxpayers, while only 3% of married taxpayers who file jointly have unpaid taxes outstanding, approximately 14% of married taxpayers who file separately have unpaid taxes outstanding.

by law and having an exchangeable value." *Drye* v. *United States*, 528 U.S. at 56.

The interest of a married taxpayer in a tenancy by the entirety is a valuable, legally protected "species of right or interest" and is therefore encompassed within the federal tax lien.[8] During the period of a tenancy by the entirety, each spouse has separate rights in the present use of the property and in its disposition upon the termination of the tenancy by sale, death or divorce. For example, in Michigan, "joint property"—a category that includes a tenancy by the entirety in real or personal property—"consist[s] of a present interest and a future interest." Mich. Comp. Laws Ann. § 554.872(g), (i) (West Supp. 1997), recodified, *id.* § 700.2901(g), (i) (West Supp. 2001). The "present interest" entitles each spouse to reside on the property, to exclude third parties from the property, to share in the profits of the property, to join or refuse to join in a sale of property and, upon the sale, individually to receive half the proceeds. *Id.* § 557.71 (West 1988); see *Rogers* v. *Rogers*, 136 Mich. App. 125, 135, 356 N.W.2d 288, 293 (Mich. Ct. App. 1984). The "future interest"

[8] The fact that a federal tax lien has been imposed on entirety property does not, by itself, divest the "marital estate" from possession. The primary effect of a lien is to ensure that such property remains potentially available for payment of delinquent taxes and cannot be transferred free of the government's claim in the interim. Moreover, as this Court emphasized in *United States* v. *Rodgers*, 461 U.S. at 696, the government's lien reaches only the taxpayer's interest in property. If the government seeks to sell the property to enforce its lien under 26 U.S.C. 7403, the court may deny foreclosure in "the exercise of reasoned discretion." 461 U.S. at 706. And, if a sale is authorized, the non-liable spouse must be compensated for her interest "according to the findings of the court in respect to the interests of the parties and the United States." *Id.* at 697 (quoting 26 U.S.C. 7403(c)).

described in the statute "is the right of survivorship," which is the right to receive the property in fee simple absolute upon the death of the other spouse. Mich. Comp. Laws Ann. § 554.872(g) (West Supp. 1997), recodified *id.* § 700.2901(g) (West Supp. 2001). These valuable interests are expressly described as "property" rights under state law. *Id.* § 700.2901(i).

The Michigan Supreme Court has emphasized that each spouse holding a tenancy by the entirety has "a significant interest in property" that is protected by the Due Process Clause of the United States Constitution. *Dow* v. *State*, 396 Mich. 192, 204, 240 N.W.2d 450, 456 (Mich. 1976). As Judge Gilman stated in his separate opinion in the court of appeals, the panel majority in this case has thus "ignored the substantial rights actually held by Don Craft." App., *infra*, 38a. These legally-protected rights have "undeniable value" and thus constitute "property or rights to property" within the broad scope of the federal tax lien. *Ibid.*[9]

2. The court of appeals erred by relying (App., *infra*, 51a-53a) on its decision in *Cole* v. *Cardoza*, 441 F.2d 1337 (6th Cir. 1971), and in failing to follow the more recent, clear guidance of this Court in *Drye* v. *United States*, *supra*, *United States* v. *Irvine*, *supra*, and *United States* v. *Rodgers*, *supra*.

a. The rationale of *Cole* v. *Cardoza*, 441 F.2d at 1343, is that state law "governs the property rights of taxpayers" and that courts must therefore "look to the law of" the State in determining whether "the federal tax

[9] The valuable, legally-protected rights of a taxpayer in entirety property under Michigan law are not less extensive than the right of an heir-at-law to inherit under Arkansas law—a right to which the federal tax lien attached under this Court's decision in *Drye* v. *United States*, 528 U.S. at 59-60.

lien attach[es] to the * * * property." The court concluded that, since "tenants by the entirety hold under a single title" under Michigan law, the federal tax lien cannot attach to the property for the debts of one spouse only. *Ibid.* The court of appeals repeated the reasoning of *Cole* by relying on what it described as "the basic tenet that state law governs the issue * * * whether any property interests exist in the first place." App., *infra*, 46a.

That reasoning is demonstrably in error, however, for this Court has made it clear that "[i]t is not material that the economic benefit to which the [taxpayer's] right pertains is not characterized as 'property' by local law." *Drye* v. *United States*, 528 U.S. at 58 n.5 (quoting W. Plumb, *Federal Tax Liens* 27 (3d ed. 1972)). This Court has clearly held that, while state law determines the nature of a taxpayer's interest in property, federal law determines whether that interest is sufficient to constitute "property" or "rights to property" under 26 U.S.C. 6321. In *United States* v. *National Bank of Commerce*, 472 U.S. at 722 (internal quotations omitted), the Court explained that:

> [o]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of the [statute], state law is inoperative, and the tax consequences thenceforth are dictated by federal law.

Courts are therefore to "look * * * to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation." *Drye* v. *United States*, 528 U.S. at 58. See also *United States* v. *Bess*, 357 U.S. 51, 56-57 (1958); *Morgan* v. *Commissioner*, 309 U.S. 78, 80 (1940). And, applying this

federal standard, this Court has clearly and concisely held that the tax lien attaches to "every species of right or interest protected by law and having an exchangeable value." *Drye* v. *United States*, 528 U.S. at 56.

b. Each spouse in a tenancy by the entirety possesses valuable legally-protected rights that constitute "property or rights to property" to which the lien applies under this expansive federal standard. See pages 12-13, *supra*. Indeed, the court of appeals ultimately appeared to acknowledge in the present case that each spouse possesses valuable rights in a tenancy by the entirety that are protected under state law. The court reasoned, however, that the federal tax lien does not attach to these interests in property—such as the right of survivorship—because the rights of each spouse are not treated as "separate" or "severable" interests under state law. App., *infra*, 57a-58a.

That reasoning conflicts with the plain text of the tax lien statute and with the clear holdings of this Court. The federal tax lien attaches to "*all* property and rights to property" (26 U.S.C. 6321 (emphasis added)), not merely to property that is immediately transferable by the person who owns the interest. For example, in *United States* v. *Rodgers*, 461 U.S. at 684-685, which concerned a married taxpayer who held an interest in homestead property that could not be mortgaged, sold or abandoned without the consent of the other spouse under state law, the Court held that the inability of the taxpayer to exercise his rights separately from the rights of his spouse was not a basis for denying foreclosure of the federal tax lien. *Id.* at 702. See also *Bank One Ohio Trust Co.* v. *United States*, 80 F.3d 173, 176 (6th Cir. 1996) (federal tax lien attaches to the interest of the beneficiary of a spendthrift trust) (cited in *Drye*

v. *United States*, 528 U.S. at 58 n.5 & 60 n.7); note 9, *supra*.

c. The court of appeals similarly ignored the precedents of this Court in relying on the fact that Michigan does not authorize the seizure of tenancy by the entirety property for the debts of only one spouse. App., *infra*, 52a (citing *Cole* v. *Cardoza*, 44 F.2d at 1343). This Court has frequently emphasized that state-law restrictions on seizure and exemptions from foreclosure do not operate to prevent the attachment and enforcement of the federal tax lien. See *Drye* v. *United States*, 528 U.S. at 59 (quoting *United States* v. *Mitchell*, 403 U.S. 190, 204 (1971) ("exempt status under state law does not bind the federal collector")); Note, *Property Subject to the Federal Tax Lien*, 77 Harv. L. Rev. 1485, 1498 (1964) (stripped of its fiction that husband and wife are a legal unit, the entirety theory "serves much the same function as an exemption created by state law" and thus should not "defeat the federal lien"). As this Court explained in detail in *United States* v. *National Bank of Commerce*, 472 U.S. at 727:

> The question whether a state-law right constitutes "property" or "rights to property" is a matter of federal law. * * * [T]he facts that under [state] law [the taxpayer's] creditors * * * could not [seize or attach the property] are irrelevant. The federal statute relates to the taxpayer's rights to property and not to his creditors' rights.

Indeed, in *United States* v. *Rodgers*, 461 U.S. at 700, the Court expressly held that "state-created exemptions against forced sale" of jointly-owned property are ineffective against the federal lien.

d. The court of appeals plainly erred in relying on the legal fiction employed in Michigan that property held in a tenancy by the entirety is owned by the marital unit, rather than by the individual spouses acting collectively. App., *infra*, 51a-53a. The court reasoned that the consequence of this legal fiction is that neither spouse has an interest in "property" or a "right to property" to which the federal tax lien could attach. *Ibid.*

This Court has emphasized, however, that the federal tax lien statute is not "struck blind" by state legal fictions concerning property ownership. *Drye* v. *United States*, 528 U.S. at 59. In *Drye*, the Court applied that principle in holding that the federal tax lien attached to the interest of an heir who disclaimed his rights in an intestate estate even though state law deemed any such disclaimer to have occurred *before* the death of the decedent so that creditors would be unable to attach the disclaimant's interest in the estate. The Court held that the federal tax lien statute is "not struck blind" by the legal fictions of state law and that the right of the heir to inherit is "a valuable, transferable, legally protected right" to which the federal tax lien attached before the disclaimer was made. *Id.* at 59, 60. See also *United States* v. *Irvine*, 511 U.S. at 240 ("Congress had not meant to incorporate state-law fictions as touchstones of taxability when it enacted the Act.").

Indeed, in *Tyler* v. *United States*, 281 U.S. 497 (1930), this Court specifically rejected the proposition that federal tax law is "struck blind" by the state law fiction that entirety property is owned by the "marital unit" rather than by the spouses acting collectively. That case concerned the constitutionality of the Revenue Act of 1916, ch. 463, § 202(c), 39 Stat. 778, which taxed the total value of entirety property—both the share attrib-

utable to the decedent and to the surviving spouse—in the estate of the first spouse to die.[10] The estate administrators contended that the entirety property was owned by the marital unit under state law and that, on the death of the first spouse, the survivor merely retained what she already had. They argued that a transfer of property therefore did not occur on the date of death and that the estate tax, as applied to this situation, constituted an unconstitutional direct tax without apportionment. 281 U.S. at 500. The Court rejected this argument and explained in detail why the "amiable fiction of the common law [that] husband and wife are but one person" is not binding on federal tax legislation (*id.* at 503):

> According to the amiable fiction of the common law, * * * husband and wife are but one person * * *. This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law.

Federal tax law thus looks to "the actual results" rather than merely to "the artificial rules" of state law in determining the nature and taxability of the rights possessed by tenants by the entirety. *Ibid.* In *Tyler*,

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[10] Section 2040(b) of the Internal Revenue Code currently includes only one-half of the value of such property in the decedent's gross estate. 26 U.S.C. 2040(b).

because the death of the first spouse resulted in an expansion of the survivor's "actual" property rights, the Court upheld the constitutionality of the estate tax on the entire value of the entirety property. 281 U.S. at 504.[11]

In *United States* v. *Rodgers*, 461 U.S. at 703 n.31, although the precise question at issue here was not presented, the Court stated that it was not convinced of the correctness of appellate decisions that, prior to that date, had concluded that the federal tax lien would not attach to a taxpayer's interest in a tenancy by the entirety.[12] Noting that these older cases had rested on "the peculiar legal fiction governing tenancies by the entirety in some States," the Court emphatically questioned "*if* the tenancy by the entirety cases are correct." *Ibid.* (emphasis in original). As one commentator has observed, the reasoning of the older cases that relied on the state legal fiction of the "marital unit" "was dubious before" and "[n]ow, after *Drye*, its incorrectness is glaringly clear." S. Johnson, *After Drye: The Likely Attachment of the Federal Tax Lien to*

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[11] In explaining the reasoning of *Tyler* in *United States* v. *Jacobs*, 306 U.S. 363 (1939), the Court emphasized that "[t]he constitutionality of an exercise of the taxing power of Congress is not to be determined by such * * * ancient fictions" as the ownership of entirety property by the marital unit. *Id.* at 369.

[12] The cases cited by the Court in *Rodgers* are *United States* v. *American National Bank*, 255 F.2d 504, 507 (5th Cir.), cert. denied, 358 U.S. 835 (1958), and *United States* v. *Hutcherson*, 188 F.2d 326, 331 (8th Cir. 1951). The Eighth Circuit recently distinguished its decision in *Hutcherson* in *Cox* v. *Commissioner*, 121 F.3d 390, 392 (1997).

Tenancy-by-the-Entireties Interests, 75 Ind. L.J. 1163, 1189-1190 (2000).[13]

e. In his separate opinion below, Judge Gilman agreed with the government that the decision of the panel majority "contravenes recent Supreme Court decisions." App., *infra*, 41a. The panel majority stated, however, that the decisions of this Court concerning the relationship of federal and state law under the federal tax lien statute "have wavered over time" and that the most recent decisions (such as *Drye* and *Irvine*) have "not so fundamentally changed the legal landscape" as to require a different result in this case. *Id.* at 14a n.12, 18a. The court of appeals thus squarely refused to apply the recent and clear admonition of this Court in *Drye* that, notwithstanding state legal fictions, the federal tax lien statute reaches the realities of the taxpayer's "valuable" and "legally protected" interests in property. 528 U.S. at 58-59. In view of the court's refusal (at the suggestion of one of its members) to redress this conflict en banc, certiorari review is the only means now available for obtaining compliance with the "recent * * * decisions" of this Court. App., *infra*, 42a.

3. This Court has emphasized the importance in a national tax system of avoiding "inequalities in the administration of the revenue laws" and of ensuring that taxpayers do not receive "treatment different from that given to other taxpayers of the same class." *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948). See also *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. at 544. The decision of the court of appeals disserves that

[13] See also S. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 Mo. L. Rev. 839, 871 (1995).

principle. The tenancy by the entirety is a form of property ownership that exists in 24 States, the Virgin Islands and the District of Columbia.[14] Of all the forms of joint property ownership, the tenancy by the entirety is the *only* form that has been treated as exempt from the federal tax lien. Every other type of jointly-owned property has consistently been held subject to the federal tax lien. See, *e.g.*, *United States* v. *Rodgers*, 461 U.S. at 690-691 (homestead property); *United States* v. *Davenport*, 106 F.3d 1333, 1337 (7th Cir. 1997) (joint tenancy); *United States* v. *Kocher*, 468 F.2d 503, 507 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973) (tenancy in common); *United States* v. *Overman*, 424 F.2d 1142, 1145 (9th Cir. 1970) (community property); *Washington* v. *United States*, 402 F.2d 3, 7 (4th Cir. 1968), cert. denied, 402 U.S. 978 (1971) (property subject to dower interest). Under the decision in this case, a taxpayer who owns property in a tenancy by the entirety is thus treated more favorably than a taxpayer who owns property in the 26 States that do not recognize, or have abolished, that form of ownership.[15]

[14] These States are Alaska, Arkansas, Delaware, Florida, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Mississippi, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming. See R. Heaton, *Administration of Entireties Property in Bankruptcy*, 60 Ind. L.J. 305, 309 n.24 (1985); 735 Ill. Comp. Stat. Ann. 5/12-112 (West 1993 & Supp. 2000). In addition, between 1972 and 1985, a tenancy by the entirety could be created in Ohio, and an entirety interest created during that period is still treated as valid. Ohio Rev. Code Ann. §§ 5302.17-5302.21 (Anderson 1989 & Supp. 2000); see *In re Cline*, 164 B.R. 592, 593-594 (Bankr. S.D. Ohio 1994).

[15] As part of the progressive recognition of women's property rights during the Nineteenth Century (under what were generally known as the Married Women's Property Acts), several western

There is no adequate basis in the text or the purpose of the federal tax lien statute for this difference in treatment. To the contrary, as this Court has stated, there is a "sufficient similarity between joint tenancies and tenancies by the entirety to have moved Congress to treat them alike for purposes of taxation." *United States* v. *Jacobs*, 306 U.S. 363, 370 (1939). In all other respects, these two forms of ownership have consistently received equal treatment under the revenue laws (*ibid.* (emphasis added)):

> A tenancy by the entirety "is essentially a joint tenancy, modified by the common law theory that husband and wife are one person." *Only a fiction stands between the two.* Survivorship is the predominant and distinguishing feature of each.

Even within the group of States that recognize tenancies by the entirety, the decision in this case produces inconsistent treatment. Under the decision below, taxpayers who own entirety property in the States where creditors can attach such property for a debt owed by *one* spouse are treated less favorably than taxpayers who own such property in the States where creditors can attach such property only for a debt owed by *both* spouses.[16] See, *e.g.*, *Geiselman* v.

States never chose to adopt the tenancy by the entirety and several other states elected to abolish or restrict that form of ownership. S. Johnson, *supra*, 60 Mo. L. Rev. at 843. See, *e.g.*, *Kerner* v. *McDonald*, 60 Neb. 663, 84 N.W. 92 (1900). In England, where the tenancy by the entirety originated, that form of ownership was abolished in 1925. S. Johnson, *supra*, 60 Mo. L. Rev. at 843.

[16] Fourteen States (and the Virgin Islands and the District of Columbia) prohibit creditors from attaching entirety property for the debts of only one spouse: Delaware, Florida, Hawaii, Illinois,

United States, 961 F.2d 1, 7 (1st Cir.), cert. denied, 506 U.S. 891 (1992) (husband's interest in entirety property is subject to the federal tax lien because Massachusetts

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Indiana, Maryland, Michigan, Missouri, North Carolina, Pennsylvania, Rhode Island, Virginia, Vermont and Wyoming. See *Mitchell* v. *Wilmington Trust Co.*, 449 A.2d 1055, 1057-1058 (Del. Ch. 1982), aff'd, 461 A.2d 696 (Del. 1983); *Finley* v. *Thomas*, 691 A.2d 1163, 1166 (D.C. 1997); *Sitomer* v. *Orlan*, 660 So. 2d 1111, 1114 (Fla. Dist. Ct. App. 1995); *Sawada* v. *Endo*, 57 Haw. 608, 617, 561 P.2d 1291, 1297 (1977); 735 Ill. Comp. Stat. Ann. 5/12-112 (West 1993 & Supp. 2000); *Diss* v. *Agri Bus. Int'l, Inc.*, 670 N.E.2d 97, 99 (Ind. Ct. App. 1996); *State* v. *One 1984 Toyota Truck*, 311 Md. 171, 187, 533 A.2d 659, 667 (1987); *SNB Bank & Trust* v. *Kensey*, 145 Mich. App. 765, 775-777, 378 N.W.2d 594, 599 (1985); *In re Van Der Heide*, 164 F.3d 1183, 1184 (8th Cir. 1999) (Missouri law); *Dealer Supply Co.* v. *Greene*, 108 N.C. App. 31, 34, 422 S.E.2d 350, 352 (1992), review denied, 333 N.C. 343, 426 S.E.2d 704 (1993); *Koffman* v. *Smith*, 453 Pa. Super. 15, 27, 682 A.2d 1282, 1288 (1996); *Bloomfield* v. *Brown*, 67 R.I. 452, 25 A.2d 354 (1942); *Masonry Prods., Inc.* v. *Tees*, 280 F. Supp. 654, 657 (D.V.I. 1968); *Rogers* v. *Rogers*, 257 Va. 323, 326, 512 S.E.2d 821, 822 (1999); *Lowell* v. *Lowell*, 138 Vt. 514, 516, 419 A.2d 321, 322 (1980); *Colorado Nat'l Bank* v. *Miles*, 711 P.2d 390, 393-394 (Wyo. 1985). Nine of the States that recognize the tenancy by the entirety, however, permit creditors to attach one spouse's interest in such property for the debts of only that spouse, subject to the rights of the nondebtor spouse: Alaska, Arkansas, Kentucky, Massachusetts, New Jersey, New York, Oklahoma, Oregon, Rhode Island, and Tennessee. See Alaska Stat. § 09.38.100(a) (Michie 2001); *Morris* v. *Solesbee*, 48 Ark. App. 123, 128, 892 S.W.2d 281, 283 (1995); *Hoffman* v. *Newell*, 60 S.W.2d 607, 613 (Ky. 1932); *In re Snyder*, 231 B.R. 437, 442 (Bankr. D. Mass. 1999); *United States* v. *Jones*, 877 F. Supp. 907, 916-920 (D.N.J.), aff'd mem., 74 F.3d 1228 (3d Cir. 1995); *BNY Fin. Corp.* v. *Moran*, 154 Misc. 2d 435, 436, 584 N.Y.S.2d 261, 262 (Sup. Ct. 1992); Okla. Stat. Ann. tit. 60, § 74 (West 1994); *Wilde* v. *Mounts*, 95 Or. App. 522, 524-525, 769 P.2d 802, 803-804 (1989); *Arango* v. *Third Nat'l Bank*, 992 F.2d 611, 613 (6th Cir. 1993) (Tennessee law). The rule in Mississippi is uncertain. See *Cuevas* v. *Cuevas*, 191 So. 2d 843 (Miss. 1966).

law permits creditors to attach his interest in the property); *United States* v. *Diemer*, 859 F. Supp. 126, 131 (D.N.J. 1994), rev'd on other grounds *sub nom. United States* v. *Avila*, 88 F.3d 229 (3d Cir. 1996) (same under New Jersey law); *United States* v. *Brynes*, 848 F. Supp. 1096, 1099 (D.R.I. 1994) (same under Rhode Island law); *United States* v. *Ragsdale*, 206 F. Supp. 613 (W.D. Tenn. 1962) (same under Tennessee law).

The arbitrary inequality of treatment that results under the decision in this case is magnified by the fact that entirety ownership is not limited to real estate. At least fourteen States (and the District of Columbia) also allow personal property—such as automobiles, stocks, bonds and bank accounts—to be owned in a tenancy by the entirety.[17] Several other States allow some, but not

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[17] These jurisdictions are: Alaska, Arkansas, Delaware, the District of Columbia, Florida, Hawaii, Kentucky, Maryland, Massachusetts, Missouri, Oklahoma, Pennsylvania, Tennessee, Vermont, and Virginia. See *Faulk* v. *Estate of Haskins*, 714 P.2d 354 (Alaska 1986); *Boggs* v. *Boggs*, 26 Ark. App. 188, 190, 761 S.W.2d 956, 957 (1988); *Ciconte* v. *Barba*, 161 A. 925 (Del. Ch. 1932); *In re Estate of Wall*, 440 F.2d 215, 219 (D.C. Cir. 1971); *Beal Bank, SSB* v. *Almand & Assocs.*, 780 So. 2d 45, 53-54 (Fla. 2001); *Traders Travel Int'l, Inc.* v. *Howser*, 69 Haw. 609, 613, 753 P.2d 244, 246 (1988); Ky. Rev. Stat. Ann. § 140.050 (Michie 1991); *State* v. *One 1984 Toyota Truck*, 69 Md. App. 235, 237-238, 517 A.2d 103, 104 (1986), aff'd, 311 Md. 171, 533 A.2d 659 (1987); *Woodard* v. *Woodard*, 216 Mass. 1, 2, 102 N.E. 921, 922 (1913); *Hallmark* v. *Stillings*, 648 S.W.2d 230, 233 (Mo. Ct. App. 1983); Okla. Stat. Ann. tit. 60, § 74 (West 1994); *Madden* v. *Gosztonyi Sav. & Tr. Co.*, 331 Pa. 476, 483, 200 A. 624, 628 (1938); *White* v. *Watson*, 571 S.W.2d 493, 495 (Tenn. Ct. App. 1978); *Beacon Milling Co.* v. *Larose*, 138 Vt. 457, 461, 418 A.2d 32, 33 (1980); *Oliver* v. *Givens*, 204 Va. 123, 126, 129 S.E.2d 661, 663 (1963).

all, types of personal property to be owned in a tenancy by the entirety.[18]

4. The decision in this case not only produces inconsistent treatment of similarly situated taxpayers, it also provides significant opportunities for obstructing and avoiding the collection of taxes. For example, under the reasoning of the decision below, both spouses may earn income, fail to file returns or file only separate returns (see note 6, *supra*), place their assets—such as real property, stocks, bonds and bank accounts—in a tenancy by the entirety, and claim an exemption of that property from tax collection. They could then use that "exempt" property to earn income or to pay other debts. As Judge Ryan emphasized in his separate opinion in this case, the majority opinion "not only contravenes established precedent, but provides an avenue for easy avoidance of federal income-tax laws." App., *infra*, 70a. This decision has, in short, "left us with a rule which compromises the revenue, creates a ready pathway for tax avoidance, defeats equal treatment of taxpayers, and lacks any defensible doctrinal underpinning." S. Johnson, *supra*, 60 Mo. L. Rev. at 888.

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[18] For example, Michigan allows bonds, stocks, mortgages, promissory notes, debentures, and other financial assets to be held in a tenancy by the entirety. *DeYoung* v. *Mesler*, 373 Mich. 499, 505, 130 N.W.2d 38, 41 (1964) (dissenting opinion). In Michigan and Indiana, personalty derived from real estate (such as crops) and the proceeds of the sale of real estate may be owned in tenancy by the entirety when the underlying real estate was itself held in that form of ownership. See *ibid.*; *Koehring* v. *Bowman*, 194 Ind. 433, 142 N.E. 117, 118 (1924).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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